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* J.D. Candidate, Fordham University School of Law, 2005; B.A., American Studies, Brown University, 1996. I would like to thank Professor Russell Pearce for whose class in Ethics and Public Interest Law I began this project, and Professor Eduardo Penalver whose guidance and input throughout my research and writing was invaluable. I would also like to thank all of my family and friends, and dedicate this Comment to my mother whose support has been unwavering, and my father who will always be my inspiration as a lawyer.

HOUSING *GIDEON*: THE RIGHT TO COUNSEL IN EVICTION CASES

*Rachel Kleinman**

INTRODUCTION

In *Gideon v. Wainwright*, Justice Black commented that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."[1] Since Justice Black made this proclamation in 1963, most Americans intuitively accept the idea of an indigent's constitutional right to counsel in a criminal trial. While lawmakers and advocates debate over how best to deliver these services, and whether or not the right is being met adequately, they generally do not question whether the right exists.[2] Neither the legislative nor the judicial branch, however, has recognized an analogous right to counsel in civil matters.[3] Though government sponsored legal services, public interest law offices and organizations, and pro bono programs at private firms provide legal services to indigent clients, the legal services provided to indigents in civil cases fall far short of the number that are provided to people who are able to pay for legal help.[4]

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1. 372 U.S. 335, 344 (1963).

2. *See* Kim Taylor-Thompson, *The Legal Profession: Looking Backward: Tuning Up* Gideon*'s Trumpet*, 71 FORDHAM L. REV. 1461, 1462 (2003) (examining the Supreme Court's lack of guidance regarding the representation requirement); *see generally* Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783 (1997) (recognizing that while the right to counsel exists in criminal cases, indigents often receive insufficient or no counsel).

3. *See infra* Part I (discussing the holding of *Gideon v. Wainwright* and the arguments that the holding should apply to civil cases).

4. *See* Gary Bellow & Jeanne Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 342 (1978) (noting the gap between available legal services and the level of services needed to provide representation to indigents).

Scholars and practitioners make both constitutional and ethical arguments for the expansion of legal services and for the recognition of a right to counsel for the indigent client in civil matters.[5] The correct functioning of the adversarial process itself relies on the assumption that both sides are coming to the process with equal legal resources.[6] Equality of resources, however, is frequently not a reality for indigent litigants.[7] In the area of housing law and evictions, for example, advocates have argued that recognizing a right to counsel is the only way for government to minimize the effect of inequality in access to justice, and, in many cases, the only way to prevent homelessness.[8] Others have cited both feasibility and public policy in arguments against recognizing a right to counsel in eviction proceedings.[9]

Part I of this comment lays out some of the arguments for recognizing a right to counsel for indigents as well as some of the proposed solutions for making such a right a reality, focusing on the arguments made in favor of extending a right to counsel for indigents involved in eviction proceedings.[10] Part II discusses some of the problematic aspects of recognizing the right to counsel for indigent tenants, including Barbara Bezdek's critique of reliance on "access to justice" strategies[11] and Gary Bellow and Jeanne Ket-

5. *See infra* Part I (outlining arguments for recognizing a right to counsel in civil cases).

6. *See* Russell Engler, *And Justice For All—Including the Unrepresented Poor: Revisiting Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM. L. REV. 1987, 2022 (1999) ("The adversarial system presumes that both sides will be represented by counsel."); *see generally* Deborah L. Rhode, *The Constitution of Equal Citizenship for a Good Society: Access to Justice*, 69 FORDHAM L. REV. 1785 (2001) (discussing the connection between "equal justice under the law" and the assistance of council).

7. *See, e.g.*, Simran Bindra & Pedram Ben-Cohen, *Public Civil Defenders: A Right to Counsel for Indigent Civil Defendants*, 10 GEO. J. ON POVERTY L. & POL'Y 1, 1 (2003) (noting that in some civil courts ninety percent of defendants are without council) (citing Engler, *supra* note 6, at 2047 n.263).

8. *See* Andrew Scherer, Gideon*'s Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 561 (1988) (advocating appointment of counsel for indigent tenants faced with eviction and exploring the statutory bases for such an appointment); *see generally* Ken Karas, *Recognizing a Right to Counsel for Indigent Tenants in Eviction Proceedings in New York*, 24 COLUM. J.L. & SOC. PROBS. 527 (1991) (analyzing the housing problems encountered by poor New York tenants and arguing for a right to counsel in housing proceedings).

9. *See infra* Part II (discussing various arguments against recognizing a right to counsel for indigents in eviction hearings).

10. *See infra* Part I (outlining arguments in favor of a right to counsel for indigents in eviction proceedings).

11. Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 539-42 (1992) (noting that

tleson's arguments against using the wholesale expansion of legal services as a strategy for ameliorating inequality in the civil justice system.[12] Part III argues that despite these important criticisms, a strong doctrinal basis as well as a deep need—especially in the case of eviction proceedings—to recognize a right to counsel for indigents still exists.[13]

I. IN FAVOR OF THE RIGHT TO COUNSEL FOR INDIGENTS IN EVICTION PROCEEDINGS

In 1963, the Supreme Court held in *Gideon v. Wainwright*[14] that the Constitution guarantees every person charged with a felony the right to an attorney even if he or she cannot afford one.[15] Since the Supreme Court recognized the Constitutional right to counsel in criminal cases, advocates have argued for a civil version of *Gideon*.[16] Proponents of this right argue that in many civil cases the stakes are as high as those in criminal cases, and consequently the concept of equitable access to justice is empty without a recognized right to counsel in these cases.[17]

A. Equal Protection Argument

Advocates for the right to counsel for indigent litigants have argued that indigents have a right to counsel in civil cases under the Equal Protection Clause.[18] Generally, if a law "neither burdens a fundamental right nor targets a suspect class, [a court] will uphold the legislative classification so long as it bears a rational relation to some legitimate end."[19] This rational basis test is relatively easy for

"access to justice" systems emanate from a viewpoint that separates law from other political and social realms and places law in an artificial position of power).

12. Bellow & Kettleson, *supra* note 4, at 380.

13. *See infra* Part III.

14. 372 U.S. 335 (1963).

15. *Id.* at 339 (overruling *Betts v. Brady*, 316 U.S. 455 (1942), which held that denying a request for court-appointed counsel by an indigent defendant facing a state felony charge was not necessarily a violation of the Due Process clause of the Fourteenth Amendment).

16. *See infra* notes 17-108 and accompanying text.

17. *See, e.g.*, Leonard W. Schroeter, *Civil* Gideon*: If Not Why Not?*, ATJ JURISPRUDENCE, June 1999, *passim* (providing a detailed history of the right to counsel and the "Civil *Gideon*" movement, and arguing that the fundamental right of access to justice "encompasses a right to counsel in civil cases"), *available at* http://www.wsba.org/atj/committees/jurisprudence/civgid.doc.

18. *See* Bindra & Ben-Cohen, *supra* note 7, at 12 (asserting that "equality before the law" cannot exist unless both litigants in a case have access to the court system on equal terms).

19. Romer v. Evans, 517 U.S. 620, 631 (1996) (citation omitted).

a government actor to satisfy.[20] If the court determines that legislation burdens a fundamental right or discriminates based on a suspect classification, however, it will apply a "more searching judicial inquiry."[21] In order to persuade a court to apply the much tougher "strict scrutiny" analysis to determine whether a right to counsel exists in civil proceedings, one would have to prove either that the assistance of council is a fundamental right, or that discrimination based on wealth should be considered a suspect category.[22]

Leonard Schroeter argues that the right to counsel should be considered a fundamental right.[23] This right, he argues, is a product of natural law, and can be seen in American jurisprudential tradition most clearly in the Declaration of Independence.[24] Schroeter notes that most scholars see the Declaration of Independence as asserting the "self-evident truths of individual dignity, the right to be treated equally, and rights that cannot be taken from us which are classified as life, liberty and the pursuit of happiness."[25] And, Schroeter argues, the most essential of these fundamental rights is access to justice, a right that cannot be recognized without the courts also recognizing a right to counsel.[26] Proving that a right is "fundamental," however, is an extremely tough hurdle in almost any context.[27] For a right to be considered fundamental, the court considers whether the right is explicitly or implicitly guaranteed by the Constitution.[28] It is unlikely that the right to counsel in civil cases would be considered fundamental.[29]

A court could also apply a strict scrutiny test if it considered those living in poverty a suspect class.[30] Although the Court gener-

20. *See* Bindra & Ben-Cohen, *supra* note 7, at 19 (observing that under a rational basis standard, the judiciary generally gives deference to the legislature).

21. United States v. Carolene Prods., 304 U.S. 144, 153-54 n.4 (1938); *see also* Shapiro v. Thompson, 394 U.S. 618, 658 (1969) (Harlan, J., dissenting) (detailing the strict scrutiny test) (citations omitted).

22. *See* Bindra & Ben-Cohen, *supra* note 7, at 19-31.

23. Schroeter, *supra* note 17, at 62.

24. *Id.* at 62-63.

25. *Id.* at 64.

26. *Id.*

27. *Id.* at 20 (explaining that a right is not fundamental unless it is "explicitly or implicitly guaranteed by the Constitution") (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973) (finding that education has never been considered a fundamental right)).

28. *Id.*

29. *See infra* note 27 and accompanying text.

30. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (race, alienage, and national origin are suspect classes); *see also* Lewis v. Casey, 518 U.S. 343 (1996) (finding that claiming discrimination based on poverty will not merit a strict scrutiny analysis unless a group could show absolute deprivation).

ally reserves this category for discrimination based on race,[31] in *Griffin v. Illinois*,[32] a case regarding the provision of free trial transcripts to indigent defendants, the Supreme Court held that unequal treatment based on economic need is as impermissible as discrimination based on "religion, race, or color."[33] In a later case addressing the right to counsel for indigents in criminal appeals, however, Justice Clark wrote in the dissent that the Equal Protection Clause

> does not impose on the States an affirmative duty to lift the handicaps flowing from differences in economic circumstances. To so construe it would be to read into the Constitution a philosophy of leveling that would be foreign to many of our basic concepts of the proper relations between government and society. The State may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford.[34]

In 1973, the Court appeared to embrace Justice Clark's view when it held in *San Antonio v. Rodriguez* that the poor were not a suspect class triggering strict scrutiny.[35] In its holding, the Court reasoned that, "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages."[36] Thus, though cases like *Griffin* provide some hope, an argument for a right to counsel based on an Equal Protection argument is unlikely to prevail since it would necessitate a court recognizing a new fundamental right or suspect class, which the Supreme Court has been reluctant to do.[37]

B. Due Process

In his article arguing for the recognition of a constitutional right to counsel for indigents in eviction proceedings, Andrew Scherer employs a procedural Due Process argument rather than an Equal Protection one to argue that poor people have a legal right to counsel when threatened by landlords with eviction from their

31. *See, e.g.*, *City of Cleburne*, 473 U.S. at 440.
32. 351 U.S. 12 (1956).
33. *Id.* at 17.
34. Douglas v. California, 372 U.S. 353, 362 (1963) (Clark, J., dissenting) (internal citations omitted).
35. 411 U.S. 1, 28 (1973) (finding that Texas's school financing system based on property taxes did not violate the Constitution).
36. *Id.* at 24.
37. *See* Jennifer E. Watson, *When No Place Is Home: Why the Homeless Deserve Suspect Classification*, 88 IOWA L. REV. 501, 511 (2003).

homes.[38] His article also argues that the promises of *Gideon*, with respect to fair and equitable access to justice, have fallen short in terms of the real lives of those living in poverty.[39]

In *Mathews v. Eldridge*,[40] the Supreme Court created the test for determining what constitutional due process is required when someone is facing the loss of property.[41] The framework requires the balancing of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[42]

Scherer applies the *Mathews* balancing test to the hypothetical of a poor tenant faced with the loss of her home.[43] He identifies the interest at stake for indigent tenants in the case of eviction as both a property interest and a liberty interest.[44] He argues that a tenant has a property interest in her home.[45] A person or family that loses in an eviction proceeding is faced with the loss of the place where they live, and possibly the loss of possessions within the home.[46]

Scherer probes deeper to identify the liberty interest involved in eviction proceedings. Quoting *Allgeyer v. Louisiana*,[47] he defines liberty as "'the right of the citizen . . . to use [his faculties] in all lawful ways, to live and work where he will; to earn his livelihood by any lawful calling; to pursue any lawful trade or vocation.'"[48]

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38. Scherer, *supra* note 8, at 557.

39. *Id.* at 562.

40. 424 U.S. 319 (1976).

41. *Id.* at 349 (holding, in part, that "an evidentiary hearing is not required prior to the termination of [Social Security] disability benefits and that the present administrative procedures fully comport with due process").

42. *Id.* at 335.

43. Scherer, *supra* note 8, at 562-79 (concluding that applying the three-factor *Mathews* balancing test to the case of an indigent person faced with eviction supports guaranteeing appointment of counsel).

44. *Id.* at 564-69.

45. *Id.* at 564 ("The right of the tenant to continued occupancy of his home is a traditionally recognized property right.").

46. *See id.* at 564-66 (discussing the possibility that the tenant might lose his or her home and become homeless); Evi Schueller, *Unconscionable Due Process for Public Housing Tenants*, 37 U.C. DAVIS. L. REV. 1175, 1183-85 (2004) (discussing the constitutionality of civil asset forfeiture).

47. 165 U.S. 578 (1897).

48. Scherer, *supra* note 8, at 567 (quoting *Allgeyer*, 165 U.S. at 589) (alterations in original).

He thus identifies any procedure or policy that infringes on "the fundamental rights of liberty" as a restraint on the individual's liberty interest.[49]

According to Scherer, the liberty interest in the case of eviction proceedings "is one which falls within the rubric enunciated by the Supreme Court in *Lassiter v. Department of Social Services.*"[50] In *Lassiter*, the Court refused to recognize a right to counsel for people faced with termination of their parental rights.[51] In his decision for the majority, Justice Stewart derives from precedent "the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."[52]

Since the risk of eviction for the indigent tenant also carries with it the risk of homelessness, Scherer argues that the liberty interest involved in a poor person losing their home rises to the level of a deprivation of physical liberty as required by *Lassiter.*[53] As Scherer points out, those who live on the street or in shelter systems are at risk for incarceration and institutionalization.[54] And, even when they are free from prisons and other institutions, they are subject to severe restraints on their liberty.[55]

Scherer's argument that eviction proceedings implicate physical liberty is demonstrated in the case of *United States v. Leasehold Interest in 121 Nostrand Avenue*,[56] an action to enforce a forfeiture statute against public housing tenants. In this case, the court discussed the damaging effects of homelessness and poverty in New York City.[57] Speaking of what would happen to the Smiths, the family involved in the case if it were to lose its housing, the court said that, despite the overcrowding in the family's apartment, the family would be better off in its home "than they would be as atomized individuals in the streets, foster homes or shelters of New York. Exclusion from their apartment risks driving the eighteen Smith family residents far below a minimum standard for civilized living."[58]

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49. *Id.* at 567 (defining this individual liberty interest as fundamental under the Constitution).

50. *Id.* at 568.

51. 452 U.S. 18, 19 (1981).

52. *Id.* at 26-27.

53. Scherer, *supra* note 8, at 568.

54. *Id.*

55. *Id.* (noting that the homeless are at a greater risk of developing various diseases and physical problems).

56. 760 F. Supp. 1015 (E.D.N.Y. 1991).

57. *Id.* at 1023.

58. *Id.*

Scherer also points to a number of the devastating effects of homelessness to illustrate the loss of personal freedom that those without permanent shelter experience. Homeless individuals are more likely to suffer from chronic medical issues.[59] Without access to a healthy diet or the means to take care of personal hygiene, homeless people with health problems such as epilepsy and diabetes may have an extremely difficult time keeping these conditions under control.[60] The risk of contracting other illnesses is also high for this population.[61]

Homelessness also has severe social consequences. Those who lose their homes can also lose their connection to their communities, and the social and economic support that comes along with community and kinship ties.[62] Without a permanent address it is also difficult for homeless people to vote or to find and keep a job.[63] Homeless children are subject to additional consequences, including gaps in school attendance and removal from their parents and siblings if placed in foster care.[64]

According to Scherer, the repercussions of homelessness make up the liberty interest that is at stake for indigent families and individuals who are faced with the threat of eviction from their homes. Viewed in this light, the potential loss to tenants can be compared to the liberty interest at stake in criminal prosecutions where the defendant risks incarceration.[65]

The second part of the *Mathews* test requires an analysis of the risk of error in eviction proceedings, as well as the role that declaring a right to counsel might have in alleviating this risk.[66] The possibility of error in lopsided eviction hearings is large.[67] While most landlords are represented by counsel, most tenants facing eviction are poor, and therefore unable to afford attorneys.[68] Though there

59. Scherer, *supra* note 8, at 568 (citation omitted).

60. *Id.* (citation omitted).

61. *Id.* at 568 n.45 and accompanying text ("For example, a high incidence of severe malnutrition, anemia, lice infestation and tooth decay have been documented among homeless youth.").

62. *Id.* at 569 (arguing that these relationships are crucial to "one's sense of identity and well-being").

63. *See id.* at 569 (claiming homelessness at any age hampers a person's ability to function as a productive member of society).

64. *See id.* (discussing the effects of community separation on children).

65. *See id.* at 563 (comparing the "equally devastating effects" of losses in criminal courts, family courts, and housing courts).

66. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

67. *See* Scherer, *supra* note 8, at 571-73 ("[T]he unrepresented indigent tenant [is] severely disadvantaged in her ability to defend an eviction case.").

68. *See id.*

are a limited number of legal services available to indigent tenants, most go through eviction proceedings pro se.[69]

The modern legal relationship between landlord and tenant is an extremely complex one.[70] Each party involved in an eviction proceeding has to deal with an intricate body of law, including housing codes to protect the tenant, and legislation that limits landlords' grounds for eviction.[71] Mastery of these laws and regulations is generally a prerequisite for either side to obtain a winning outcome.[72] It is not difficult to imagine a case in which an indigent tenant is not aware of, or, for some other reason, is unable to present in court valid legal defenses which could change the outcome of a decision.[73]

Additionally, eviction hearings are adversarial proceedings that require a specific knowledge of the rules of procedure and evidence.[74] The unrepresented, indigent litigant often does not have any access to this knowledge or the time in which to educate herself about these rules.[75] Again, there is a high risk that a tenant's absence of legal knowledge could lead to an incorrect outcome in a case that will cost the litigant her home.[76] Thus, the risk of error in these proceedings is high.

Given the complex law involved in these proceedings, there is no question that the side represented by experienced legal counsel has a distinct advantage over the pro se litigant.[77] A Supreme Court case, *Lassiter v. Department of Social Services* held that there was no right to counsel in cases involving the termination of parental rights, in part because the Court could not find a determinative difference in outcomes resulting from having counsel for these proceedings.[78] In contrast, in their 2001 study on the impact of counsel for poor tenants in New York City's housing court, Carroll Seron, Gregg Van Ryzin, Martin Frankel, and Jean Kovath discovered

69. *See id.* at 572 n.59 (noting that only 20.8% of all tenants in New York City's Housing Courts were represented) (citation omitted).

70. *Id.* at 569.

71. *See id.* at 570 (discussing various efforts of state and federal legislatures aimed at aiding tenants).

72. *See id.* at 570.

73. *See, e.g., id.* at 557-58 (relaying a story of indigent South Bronx tenant who probably would have avoided eviction if she had been represented by counsel).

74. *See id.* at 572 (discussing the "technical and complex nature" of eviction proceedings).

75. *Id.*

76. *See supra* notes 67-68 and accompanying text.

77. *See supra* notes 74-75 and accompanying text.

78. 452 U.S. 18, 32-33 (1981).

that the existence of legal representation had a large impact on the outcome of eviction cases.[79] Their research provided evidence that the presence of legal representation for indigent tenants contributes to case resolutions that include fewer evictions and more rent abatements and apartment repairs.[80] Similarly, in his examination of a study regarding eviction proceedings in New Haven, Connecticut, Steven Gunn concluded that "legal services attorneys were able to prevent or delay [tenant] evictions, helping the tenants either to remain in their homes or to secure alternate housing without suffering sudden dislocation or homelessness."[81]

Though Scherer's Due Process analysis describes conditions existing more than twenty years ago, his article predicts that the presence of counsel would have a positive impact on the outcome of eviction cases.[82] His article identifies the heavy caseloads of housing courts as one factor that increases the disadvantage to the pro se defendant.[83] Heavy caseloads can lead courts to do less than thorough examination of evidence and to implement time saving devices that could violate the tenant's right to a fair hearing.[84] High dockets can contribute to judicial failure to determine whether unarticulated defenses exist.[85] Scherer further argues that the time pressures of court appearances and filings can intimidate the inexperienced litigant (sometimes so much so that the litigant agrees to an inequitable settlement).[86] Attorneys can mitigate the effects of these time pressures and the risk of error in eviction proceedings by bringing forward legal defenses and counterclaims.[87]

Evaluating the third prong of the *Mathews* test, Scherer further argues that no countervailing government interest outweighs the liberty interest at stake, the risk of error, and the advantages of having counsel in eviction proceedings.[88] In fact, according to Scherer, the government's primary interests should be to avoid

79. *See* Carroll Seron et al., *The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City's Housing Court: Results of a Randomized Experiment*, 35 LAW & SOC'Y REV. 419, 419 (2001) (noting that only twenty-two percent of represented tenants had final judgments against them, while fifty-one percent of tenants without legal representation had final judgments against them).

80. *See id.*

81. Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385, 421 (1995).

82. *See* Scherer, *supra* note 8, at 573-76.

83. *See id.* at 573.

84. *See id.*

85. *See id.*

86. *Id.* at 573-74.

87. *See id.* at 575-76.

88. *Id.* at 576-79.

wrongful evictions, to prevent the negative effects of homelessness, and to ensure the quality of life of its citizens.[89] There are costs associated with promoting these interests and the problem of limited resources must be addressed.[90] Despite these costs, Scherer argues that the government savings resulting from the prevention of homelessness and the provision of social services to fewer people could offset the cost of providing counsel to indigents.[91] When all of these interests are balanced, Scherer argues that the cost to the government of providing counsel would be outweighed by the tremendous benefits representation in eviction proceedings would provide.[92]

C. New York State Right to Counsel

Though the federal Due Process argument for the right to counsel in civil cases has not yet been successful in court, there is support for the right to counsel for indigents in eviction cases through the Due Process clauses in numerous state constitutions.[93] As Scherer notes, many state constitutions contain Due Process clauses, and state courts have at times interpreted these clauses as conferring broader rights than those bestowed by the federal Constitution.[94] For example, the New York Court of Appeals "has construed broad protections from the 'unique language' of the state's constitutional due process clause and given greater protection to New York residents than those afforded in the U.S. Constitution."[95]

In his article about eviction proceedings in New York, Karas argues that the courts should recognize the right to counsel for indigent defendants based on New York State's Due Process clause.[96] Karas adds that "[w]hile the courts can do little to improve the

89. *See id.* at 577-78. Though increased access to counsel will certainly not cure affordable housing shortages or homelessness, Scherer's argument is that providing counsel and preventing wrongful evictions will at least be a big step in the right direction. *Id.* at 591-92.

90. *See id.* at 577.

91. *See id.* at 578-79.

92. *See id.*

93. *See, e.g.*, Miss. Const. art. III, § 14 (1890) ("No person shall be deprived of life, liberty, or property except by due process of law."); NEV. CONST. art. I, § 8 (1864) ("No person shall be . . . deprived of life, liberty, or property, without due process of law.").

94. *See* Scherer, *supra* note 8, at 583.

95. *See* Karas, *supra* note 8, at 541 (citing Sharrock v. Dell Buick-Cadillac, Inc., 379 N.E.2d 1169, 1173 (N.Y. 1978)); *see also* N.Y. CONST. art. I, § 6 ("No person shall be deprived of life, liberty or property without due process of law.").

96. *See* Karas, *supra* note 8, at 543.

New York housing market or public assistance programs, they can demonstrate their commitment and obligation to preserve due process of law by providing counsel for tenants faced with eviction."[97]

D. Provision of Expanded Legal Services

Those who argue that indigents have a legal right to counsel in eviction cases, such as Scherer and Karas, present suggestions for how the state could meet the demand for attorneys.[98] One option is for states to expand current systems for appointing attorneys to criminal defendants to include attorneys for civil cases.[99] Such an expansion would likely tend to replicate the problems that already exist on the criminal defense side.[100] In states where any member of the bar can be appointed to defend an indigent client, the state cannot guarantee a lawyer with expertise in the particular area for which the client requires legal assitance.[101] In states where courts appoint attorneys who have voluntarily placed themselves on a list of those willing to take indigent cases, the compensation from the state for representing an indigent client is vastly lower than the compensation that the lawyers could earn from a paying client.[102] Low rates serve to reduce the pool of competent attorneys who are willing to take on these cases, and induce those who do to take on as many cases as possible in order to make a living.[103] Thus, if this system were adopted in civil cases, similar factors could contribute to a lower quality of lawyering than is provided to the paying client.

The state could also provide qualified attorneys to indigents in housing cases by increasing funding for public legal services. Legal services organizations cannot now meet the demand for represen-

97. *Id.* at 543.

98. *See* Scherer, *supra* note 8, at 589-91 (advocating the creation of a pool of volunteer attorneys or, in the alternative, legislative funding for tenant representation); *see also* Karas, *supra* note 8, at 556-61 (suggesting the solicitation of volunteer attorneys or mandatory court appointments).

99. *See, e.g.,* Scherer, *supra* note 8, at 590 (concluding that such an expansion would not be the most efficient solution).

100. *See id; see generally* Bright, *supra* note 2.

101. *See* Bright, *supra* note 2, at 789 (stating that judges may appoint attorneys who try cases quickly rather than capably).

102. *See* DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 253 (2001) (noting that ceilings on fees for representing indigent clients can result in payment as low as $2 an hour).

103. *See id.*

tation in eviction proceedings.[104] If the courts were to recognize a right to counsel, the legislature could accompany this finding with an increase in funding for organizations that already have the needed expertise for defending tenants in eviction hearings. Though this may be appealing in theory, it seems unlikely to be politically viable.[105]

A third option for providing attorneys in civil cases, including evictions, is for the state to rely on a scheme in which lawyers volunteer their legal services free of charge. Unless the court enforced a system of mandatory pro bono service for attorneys and law students, however, it is unlikely that supply could ever meet demand.[106] The arguments for requiring all members of the bar to provide free legal services to the poor are wide-ranging, and certainly go beyond the issue of recognizing a right to counsel in eviction cases.[107] Though the legal community has been engaged in debate about instituting mandatory pro bono for decades and the ABA has adopted Model Rule 6.1 which calls for the performance of fifty hours a year of pro bono service, no state or federal government has adopted such a system.[108]

Though the provision of an adequate supply of attorneys for indigents in need of help with eviction proceedings would certainly prove complicated, these complications do not weaken the doctrinal arguments for judicial-recognition of the right to counsel in eviction cases. In fact, a judicial recognition of the right to counsel could serve as incentive for politicians, lawyers, and scholars to come up with creative and appropriate remedies for increasing indigents' access to legal services.

II. CRITIQUES OF RECOGNIZING A RIGHT TO COUNSEL

The arguments against recognizing a right to representation for indigents in eviction proceedings go beyond questions about possible methods by which the state could provide such legal represen-

104. *See* Bindra & Ben-Cohen, *supra* note 7, at 4 (explaining that, although there are legal resources available to indigent litigants in civil cases, the demand exceeds the supply).

105. *See id.* at 4-5 (noting that those in power often view the pro bono initiatives currently in place as sufficient to meet the needs of indigent civil litigants, thereby rendering increased funding for such programs unnecessary).

106. *See id.*; Karas, *supra* note 8, at 557 (positing that "the supply of available attorneys will likely remain insufficient without a mandatory pro bono requirement").

107. *See* RHODE & LUBAN, *supra* note 102, at 761-74 (discussing an attorney's ethical obligation to provide pro bono services).

108. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2002).

tation. Critics point to cost, increased incentive to litigate, the likelihood that access to counsel will not rectify many structural deficiencies in housing courts, and the possibility of increased inequality within the justice system as reasons for not recognizing this right.[109] Though each of these critiques raises interesting problems, none of them ultimately destroys the doctrinal support or the brutal need for counsel for indigents facing the loss of their homes.

A. Government Cost

One critique of recognizing a right to counsel follows directly from Scherer's position that the Due Process clause confers a federal right to counsel, and more precisely from the balancing test put forth in *Mathews v. Eldridge*.[110] While Scherer and others argue that cost should be unimportant in a court's recognition of this right to counsel,[111] one cannot ignore that the financial cost to the government of providing legal services might arguably outweigh other government interests in providing such services.[112] A court that finds that the government's interest in conserving resources (or using resources in another manner) outweighs the personal interests of people facing eviction from their homes, might reach a different outcome than Scherer did in the *Mathews* balancing test.[113]

Proponents of the right to counsel make compelling arguments that, no matter the cost, the government interest is served by the provision of counsel to indigents and increased equality with respect to access to justice.[114] Although the existence of limited resources is an issue in recognizing any positive right, a judicial

109. *See infra* notes 110-75 and accompanying text.

110. *See* Scherer, *supra* note 8, at 563 (arguing that application of the three-pronged *Mathews* test leads to the conclusion that indigent tenants facing eviction should be appointed counsel).

111. *See id.* at 577-78 (stating that "cost alone should not deter the government from vindicating important legal rights").

112. *See* Karas, *supra* note 8, at 547 (stating that if providing "the right to counsel would involve mass expenditure of public monies, the courts could conclude that the balance of interests, public and private, weigh against provision of counsel").

113. *See id.*

114. *See* Gunn, *supra* note 81, at 421 (concluding that counsel for indigents in eviction proceedings provides an essential service to both individual tenants and society as a whole); Karas, *supra* note 8, at 547 (arguing that the provision of legal services to the poor in eviction proceedings would result in the government saving money by reducing the amount that would need to be spent on services for the homeless); Scherer, *supra* note 8, at 577-78 (concluding that the benefits, both social and financial, of providing free legal counsel to indigent tenants facing eviction outweigh the fiscal costs).

recognition of high cost as a legitimate governmental interest could lead to the revocation of any number of rights, especially in times of fiscal crisis. While advocates and policy makers would certainly have to take government cost into account in creating an effective system to ensure that a right to counsel is met, the financial cost to government should not come into play in a court's determination of whether such a constitutional right exists.[115]

B. Landlord Cost

On the surface, a more compelling economic argument addresses the costs that a recognition of the right to counsel for tenants facing eviction proceedings would impose on landlords and, possibly, tenants. In 1973, John Bolton and Stephen Holtzer published the results of a study they had conducted concerning the effects of legal representation for indigents in eviction cases in New Haven.[116] Based on the results of this study, Bolton and Holtzer concluded that providing legal counsel to defendants in eviction proceedings actually increased the financial burden on poor people.[117]

Bolton and Holtzer set out to assess the wider impact of legal counsel in eviction cases in New Haven by comparing cases in which tenants received free legal assistance with those in which tenants litigated pro se or were represented by private counsel.[118] They examined the length of the eviction proceedings in cases where the New Haven Legal Assistance Association ("LAA") provided tenants with legal representation, and concluded that the presence of LAA counsel resulted in an increase in the amount of time it took for eviction proceedings to take place.[119] Bolton and Holtzer argue that the time differential created by lawyers' zealous representation of tenants puts financial burdens on landlords.[120] Landlords facing tenants represented by counsel have increased legal fees of their own, and they do not receive rent from tenants pending the outcomes of these hearings.[121] These costs, according

115. *See* Scherer, *supra* note 8, at 577.

116. John Bolton & Stephen Holtzer, *Legal Services and Landlord-Tenant Litigation: A Critical Analysis*, 82 YALE L.J. 1495 (1973).

117. *See id.* at 1503.

118. *See id.* at 1495-97.

119. *See id.* at 1497-98 (noting that the time required for disposition when the tenant was represented by a LAA attorney was over four times longer than when the tenant was represented by a private attorney).

120. *See id.* at 1499, 1502.

121. *See id.*

to Bolton and Holtzer, are then passed on to other tenants in the form of rent increases and poorer quality in housing conditions.[122]

Additionally, Bolton and Holtzer argue that free legal counsel in eviction proceedings often does not alter the results.[123] They claim that legal services lawyers usually represent tenants who are being evicted for non-payment of rent and therefore have limited legal defenses to eviction.[124] Thus representation, while prolonging the process and increasing costs, rarely actually prevents eviction.[125] Based on their observations about the complications with levels of legal representation in 1973, it is likely that Bolton and Holtzer would criticize the expansion of such services.

In response to the New Haven study and others like it, however, Steven Gunn argues that the costs to landlords and tenants of representation are overstated and can be explained by flaws in the design of the studies.[126] To begin with, Bolton and Holtzer included defendants who did not contest their evictions in their control group of unrepresented tenants.[127] The group of represented tenants obviously only includes those tenants who were contesting an eviction. Since uncontested cases are quickly adjudicated, Bolton and Holtzer's inclusion of these tenants in their control group artificially enlarges the difference in length of cases where tenants are represented and those where they are not.[128]

Gunn points to another important methodological flaw within Bolton and Holtzer's study. The authors of the study calculated all cases where a landlord withdrew his action as successful evictions.[129] According to Gunn, this move seriously underestimates the favorable outcomes that LAA attorneys brought about through their representation.[130] When a landlord withdraws his eviction action, it can often be because the parties have successfully negotiated, and not because the tenant has agreed to vacate.[131] These

122. *See id.* at 1502-03.

123. *See id.* at 1498 ("[T]he landlord almost inevitably obtains judgment of possession.").

124. *See id.* 1498 n.8, n.14 (discussing the limited defenses available in a summary process action).

125. *See id.* at 1498 n.14 (noting that of the ninety-seven cases defended by LAA in the sample, the tenant only obtained judgment in two).

126. *See* Gunn, *supra* note 81, at 387 (discussing the major problems in Bolton and Holtzer's methodology).

127. *Id.*

128. *Id.* (arguing that a more appropriate control group would consist of unrepresented tenants who contested their eviction).

129. *Id.* at 388.

130. *Id.*

131. *Id.*

negotiations can include agreements for landlords to repair substandard housing.[132] Gunn also adds that, while Bolton and Holtzer are correct in their assertion that the majority of represented tenants were facing eviction for non-payment of rent, most of them also had valid defenses or counterclaims.[133] Thus, according to Gunn, while landlords might bear some costs if the judiciary were to recognize a right to counsel, these costs do not outweigh the overall benefits to indigent tenants or to society as a whole.[134]

C. Incentive to Litigate

Some critics oppose an increase in access to lawyers because of fear over what they perceive as an overly-litigious society.[135] If the right to counsel were absolute, critics say, then there would be nothing to prevent indigent clients from bringing frivolous claims or putting forth unmeritorious defenses.[136] Some legal scholars have pointed out, however, that in countries where a right to counsel in civil cases has already been recognized, the government has devised successful systems by which to screen cases.[137] Additionally, in eviction cases, the party with a lawyer has the opportunity to bring any and all claims that she believes to have legal merit. Giving this opportunity to the indigent defendant, whether or not it increases litigiousness, is an important way for the courts to provide equal access. Finally, in eviction cases the tenant does not initiate the proceedings. Thus, while access to an attorney may increase an indigent's incentive to fight back, it would not lead to an increase in the number of cases brought to court.

D. Beyond the Risk of Homelessness

Scherer's Due Process argument relies on the example of a tenant who becomes homeless because of an error in an eviction case.[138] Thus, it addresses neither the larger issue of homelessness that does not stem from a wrongful eviction, nor the problem of

132. *Id.*
133. *Id.* at 420-21.
134. *Id.* at 421.
135. *See* RHODE AND LUBAN, *supra* note 102, at 727 ("If parties had a right to subsidized lawyers in any civil case, what would deter them from pursuing unmerited claims and inflicting unwarranted costs, not only on the state . . . but also on innocent individual opponents?").
136. *Id.*
137. *Id.*
138. *See supra* Part I.B (discussing a Due Process argument for recognizing a right to council in eviction cases).

tenants whose wrongful eviction would not result in homelessness. Though it seems unlikely that any argument for increased access to counsel could result in a solution to homelessness, it is possible to make a Due Process argument for those tenants who do not face homelessness as a result of eviction.

Though Scherer's description of the liberty interest at stake when a tenant becomes homeless is compelling, focusing almost exclusively on this harm weakens his argument. Instead of adopting this approach, in her article *Property and Personhood*, Margaret Radin uses the example of the relationship of a tenant to his rented home to illustrate her conception of a "personhood" interest in property.[139] As she describes it, "[t]he premise underlying the personhood perspective is that to achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment."[140]

Looking at privacy-related jurisprudence, she argues that the home can be seen as "a moral nexus between liberty, privacy, and freedom of association."[141] While tenants' homes may be seen as partially belonging to them because of the rent they have paid, and partially belonging to the landlord, Radin argues that strong landlord-tenant laws actually reflect society's valuation of tenants' personhood interest in property as superior to a landlord's property interest.[142] This special relationship to the home, Radin argues, goes beyond society's interest in providing a "sanctuary" for individual liberty.[143] She maintains that society (and the courts) see the home as "the scene of one's history and future, one's life and growth."[144] Considering this conception of the home, one can see how homelessness may be the most severe, though certainly not the only interest at stake in eviction proceedings.

If the home is a space that embodies a person's history and future, a forced separation from this physical space would almost un-

139. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 991-92 (1982).

140. *Id.* at 957 (emphasis in original).

141. *Id.* at 991. Radin discusses the case *Stanley v. Georgia*, 394 U.S. 557 (1969), in which the Supreme Court held that a state can not prosecute individuals for having obscene materials in their home. *Id.* at 558. She argues that it is clear from this decision that the Court was influenced by the traditional conception of the home being connected to autonomy and personhood. Radin, *supra* note 139, at 992.

142. Radin, *supra* note 139, at 992-93.

143. *Id.* at 992 (describing the state's invasion of the "sanctity of the home" as a violation of one's personhood).

144. *Id.*

doubtedly have negative psychological effects on a tenant.[145] Additionally, being forced out of one's home could dislocate a person not just from the four walls of the home, but from the community at large.[146] Those who are evicted could lose their personal connection to family, friends, and other neighbors, as well as to the support networks that these people provide.[147] The argument for the right to counsel in eviction cases could be bolstered if, in addition to describing the risk of homelessness, proponents pointed to the possible loss of this personhood interest involved in evictions. An argument that focuses primarily on the risk of homelessness allows room for critics to argue that other reforms have alleviated the need for the assistance of counsel. For example, in New York City, where advocates have won a recognized right to housing for homeless individuals,[148] the risk of homelessness after an eviction is decreased. Thus, while a great need for indigents to have representation in eviction cases may still exist, the liberty interest at stake would no longer appear to tip the scales in the *Mathews* test.

E. The Exaggerated Role of the Attorney

Other criticisms of focusing on a right to counsel stem from an argument that such strategies rely on an exaggerated vision of the power of the advocate. In her article about housing court in Baltimore, Barbara Bezdek identifies the source of inequitable outcomes as being broader than a lack of legal representation.[149] She argues that the mostly female, black, and poor tenants[150] that come through the court are "silenced by dynamics occurring in and around the court room. This is due both to differences in speech and to dissonant interpretations between speakers and listeners, since they do not share a culture of claiming."[151] Bezdek's study does point to better outcomes for tenants who had the assistance of another person in housing court.[152] This assistance, however, did not have to come from a lawyer to produce a better outcome for a

145. *See supra* notes 139-40 and accompanying text.

146. *See supra* notes 53-65 and accompanying text.

147. *See id.*

148. *See* Callahan v. Carey, 762 N.Y.S.2d 349, 349 (App. Div. 2003) (holding that a 1981 consent decree required New York State to provide temporary shelter to homeless individuals).

149. *See* Bezdek, *supra* note 11, at 539-40 (offering a critique of the standard "access to justice" analysis).

150. *See id.* at 540.

151. *Id.* at 536.

152. *Id.* at 562.

tenant.[153] This observation leads Bezdek to speculate that "qualities other than legal representation" are important in overcoming the silencing effect of housing court.[154] Thus, while the presence of an attorney may help an individual tenant articulate legal claims and defenses, a recognition of the right to counsel might not significantly alter the bias of the court towards landlords.[155]

Persuasive arguments about the potential pitfalls of recognizing a right to counsel for poor people come from Gary Bellow and Jeanne Kettleson in their 1978 article about fairness in public interest practice.[156] Bellow and Kettleson's argument grows out of an understanding the inequities in the administration of justice in this country, and the disadvantages that are largely borne by poor people and other groups who do not have access to legal counsel.[157] Despite this understanding, Bellow and Kettleson express real concern about a large scale expansion of the number of lawyers involved in resolving disputes.[158]

Bellow and Kettleson begin their analysis discussing arguments in favor of recognizing a right to counsel for indigents in civil cases.[159] They point to the enormous gap between the demand for legal services for the poor and the legal services actually provided, and recognize that publicly-funded legal services can provide indigent clients with their only opportunity for meaningful access to and participation in the legal system.[160]

After pointing out the relative advantage in the justice system for those who have counsel, however, Bellow and Kettleson proceed to argue that the provision of access to this counsel will not effectively address the inequalities that are built into our system.[161] They argue instead that lawyers, even in larger numbers, are unlikely to substantively alter the balance of power in the United States.[162] In fact, Bellow and Kettleson examine the possibility that increased representation could potentially perpetuate the

153. *See id.* (noting that most in-court assistance is, in fact, given by non-attorneys).

154. *Id.* at 563.

155. *Cf. id.* (observing that "landlords' interests occupy the bench [in housing courts] at every moment").

156. *See generally* Bellow & Kettleson, *supra* note 4.

157. *See id.* at 379.

158. *See id.* at 379-80.

159. *See id.*

160. *See id.* at 379.

161. *See id.* (noting that the legal disadvantages facing public interest lawyers are "rooted in deeply entrenched patterns of inequality and exclusion").

162. *Id.* at 379-80.

same inequalities of the system that lead to the need for publicly-funded legal services.[163]

Though Bellow and Kettleson agree that there is a short-term benefit by providing attorneys to the poor, they maintain that the bar and members of the legal profession cannot hope to provide the poor meaningful access to justice until they reexamine the repercussions of having an intensely adversarial, complicated, and professionalized system.[164] They argue that while expansion of this system might seem like the best way to level the playing field, in the long run, this expansion might actually "intensify the legal disadvantages that public interest law is supposed to ameliorate."[165] Bellow and Kettleson maintain that proponents of the right to counsel for indigents in civil cases must consider the likelihood that providing legal services to everyone in an unequal society "may exacerbate the very problems of unfairness and inequality that access is ultimately intended to resolve."[166]

Bellow and Kettleson claim that arguments for recognizing a right to counsel and for expanding the provision of legal services tend to ignore the realities that accompany these services.[167] Because legal services lawyers often have the power to decide what becomes defined as a "legal problem," as their numbers and funding increase, lawyers would tend to include more and more problems within the universe of legally addressable issues.[168] Supply would once again be dwarfed by demand, and the expansion of legal services would simply replicate the problems with access that currently exist, but on an even-larger scale.[169] Thus, even if a court were to recognize a right to counsel in civil cases, the problem of scarcity, and the economic and social inequalities that go hand-in-hand with this scarcity, would persist.[170]

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163. *See id.*

164. *Id.* at 379 (arguing that the inherent flaws of our social and political institutions present problems of scarcity and fairness that cannot be solved merely by injecting more public interest lawyers into the system).

165. *Id.*

166. *Id.* at 379-80.

167. *Id.* at 380.

168. *See id.* ("[D]efinitions of legal need are not static.").

169. *See id.* (noting that "demand for services will increase to the limits of available supply").

170. *Id.* at 383. The authors point out that disadvantaged clients often do not have the resources to take advantage of litigation gains. *Id.* For example, a client who wins a lawsuit requiring special education services for her child may not have transportation to parent conferences, easy telecommunication services to contact the school, or money to pay for a lawyer who could help this child as he grows and his educational needs change. *Id.* at 383 n.177.

Instead of an expansion of legal services, Bellow and Kettleson call for a re-conception of the role of the lawyer.[171] Though they think that the bar should support the provision of more lawyers for the poor in the short term, they argue that in order to create change at this level, the ABA needs to amend the Model Rules of Professional Responsibility.[172] They believe that the bar should alter the code to proscribe one side taking advantage of the other side's ignorance or inexperience with the law.[173] Their vision of the code would also demand that lawyers make efforts to prevent serious personal injury to any party, require attorneys who are going up against pro se litigants to advise them how and why to get counsel, and compel such attorneys to communicate to the court any valid defenses that they reasonably believe could be available to the unrepresented side.[174] According to Bellow and Kettleson, these changes would "remove a particularly unwarranted competitive edge of those who are experienced in using legal institutions," no matter the size of the legal system.[175]

III. SOLUTIONS FOR INDIGENT TENANTS

A. Beyond the Model Rules

Since Bellow and Kettleson made their arguments in 1978, poor people and advocates have watched the federal government decrease its commitment to legal services and set limits on the way that publicly funded providers are allowed to serve their clients.[176] In this light, arguments about the futility of looking to the expansion of legal services as a way to address inequities are more convincing than ever. Bellow and Kettleson's model for change, however, has flaws of its own. These flaws become particularly apparent when examined in light of the arguments for a right to counsel in eviction cases.

Lack of counsel for indigents facing the loss of their homes is much more than an indicator of the inequities of our system of

171. *Id.* at 384-85.

172. *Id.* at 386-87. Since Bellow and Kettleson's article was published in 1977, the Model Rules have been amended. These amendments, however, have not incorporated Bellow and Kettleson's proposed amendments.

173. *Id.* at 387.

174. *See id.*

175. *Id.*

176. *See Legal Services Corporation Restrictions—Fact Sheets*, *at* http://www.brennancenter.org/programs/pov/factsheets.html (last visited Nov. 26, 2004) (presenting fact sheets regarding the restrictions on funding from the Legal Services Corporation for bringing class actions, representing aliens, and soliciting clients).

justice. The deficiency of legal services for tenants is a reality that leads to increased homelessness, poverty, and disenfranchisement.[177] As advocates have pointed out, tenants who have the assistance of counsel fare better than those who do not in eviction proceedings.[178] Therefore, though legal assistance will not correct all of the inequities in housing court nor the larger problem of homelessness, and despite the potential pitfalls associated with increasing the size of the adversary system, advocates must make arguments that indigent tenants have a right to access legal advice and representation. Bellow and Kettleson do recognize the need to increase the adversarial system in the short term, but they de-emphasize the necessity of providing lawyers for the poor in favor of an emphasis on reforming the Model Rules.[179] Though it is crucial for advocates to look at possibilities for long term systemic change if they are truly committed to providing equal access to justice, in reality poor tenants do not have the luxury of relying on idealistic procedural solutions to the problem of eviction.

While Bellow and Kettleson are rightfully cautious about embracing a wholesale expansion of legal services to include attorneys for poor people in all civil cases, they do not address the possibilities of a slower, piecemeal expansion. Such an expansion would require the courts to create a hierarchy of legal needs, and to declare a right to counsel in areas where the need is the most pressing. The courts could erase the possibility of lawyers expanding the universe of problems to be addressed by the legal system by describing the problems (e.g. eviction proceedings) to be addressed from the outset. In essence, this is what the *Mathews* balancing test allows courts to do: evaluate the need for a right to counsel in specific areas. With these limits, Bellow and Kettleson would not be able to subject the expansion of legal services to the same analysis as the declaration of a right to counsel in general. The judiciary could have a huge impact on peoples' lives by recognizing a right to counsel in eviction proceedings, and they could do this without increasing the number of issues resolved by the adversarial process.

In addition to de-emphasizing short term solutions, Bellow and Kettleson rely too heavily on the ABA and the Model Rules to precipitate a radical change in lawyers' perceptions of their roles. In theory, the Model Rules are the governing ethical code of all attorneys. In as much as the Model Rules reflect the aspirations

177. *See supra* notes 66-76 and accompanying text.
178. *See supra* notes 79-81 and accompanying text.
179. *See* Bellow and Kettleson, *supra* note 4, at 386-88.

and ideals of the legal profession, the bar should amend them to reflect any shift in understanding of the lawyer's role. But in light of the marginalization of public service and ethics among lawyers, it is unlikely that advocates could successfully use the Model Rules to overturn deeply-entrenched understandings of the lawyer as a zealous advocate and a player in an adversarial system.[180]

To create a widespread change in the lawyer's role, advocates need to start their project at the training academies for the next generation of lawyers. Law schools do teach professional responsibility and ethics, but these topics remain "no better than a second class subject in the eyes of students and faculty."[181] Most law schools do not even require students to take a legal ethics class until their upper class years.[182] By the second year, students have already taken a number of law classes, and their professors may not have asked them to think about the Model Rules or other sources of ethical standards while learning and applying legal doctrine. Thus, it is unlikely that a shift in the understanding of a lawyer's role embodied in the Model Rules will have a large trickle down effect on law students.

In order to make the changes in a lawyer's perception of her role that Bellow and Kettleson recognize as necessary to promote equality in the justice system, law school faculties and administrators, along with practitioners, need to be on the front lines of any push for change. Law schools need to place more emphasis on legal ethics and change the content of such classes.[183]

If courts were to recognize the right to counsel for indigents in eviction cases and in other situations where the stakes are similarly high, many more attorneys could end up representing indigent clients and being forced to face the inequities that are built in to our adversary system. Perhaps a critical mass of attorneys, confronted with and frustrated by these inequities, would serve as the impetus for a widespread recognition of the need for change in the lawyer's role. In the meantime, however, it is crucial for us to look for substantive solutions to the lack of affordable housing and homeless-

180. *See generally* Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381 (2001) (discussing the role of the modern lawyer).

181. Russell G. Pearce, *Legal Ethics Must Be the Heart of the Law School Curriculum*, 26 J. LEGAL PROF. 159, 159 (2001-2002).

182. *Id.* at 160 n.7.

183. *See id.* at 160 (discussing the place of ethics in law school curricula).

ness that can make immediate and concrete differences in people's lives.

B. Problem-Solving Courts and the Active Judge

Other substantive solutions that could produce better outcomes for tenants lie in between the recognition of a right to counsel and a complete transformation in the conception of the lawyer's role. For example, in recent years, most states have experimented with so called "problem-solving courts."[184] Such courts are usually structured to handle the whole range of a person's legal and social issues at once, and to provide solutions to these problems that benefit the community in which the courts are situated.[185] It is possible that these courts, which generally aim to give voice to a litigant's story, could alleviate the "silencing" problem identified by Bezdek.[186] This might serve to reduce error and allow a forum for a tenant's argument to be articulated without the presence of counsel.

In a talk about the Harlem Community Justice Center, Rolando Acosta, the presiding judge, discussed the benefits of handling housing issues in a non-traditional court.[187] Through the Housing Court that is part of the Justice Center, judges are able to "increase the stability and improve the overall health of the housing stock in Upper Manhattan . . . by linking tenants to service and benefit providers, to city and state government and other local service providers."[188] In such courts, the judge and other court employees take on the role of monitors, trying to ensure that the landlord receives the rent and the tenant receives decent housing.[189] Though many states' attempts at problem-solving courts are still in the experimental stages, these courts may actually be able to help circumvent the risk of homelessness and the lack of affordable, decent housing.

Additionally, judges who preside over traditional housing courts where the average litigant is proceeding pro se may have the power

184. *See generally* Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL'Y (2001), *available at* http:// www.courtinnovation.org/pdf/prob_solv_courts.pdf.

185. *Id; see also*, Judith S. Kaye, *Delivering Justice Today: A Problem Solving Approach*, 22 YALE. L. & POL'Y REV. 125, 127-28 (2004).

186. *See supra* notes 150-55 and accompanying text.

187. *See generally* Roland Acosta, *The Birth of a Problem-Solving Court*, 29 FORDHAM URB. L.J. 1758 (2002).

188. *Id.* at 1762.

189. *See id.*

to impact fairer outcomes. In his article addressing solutions to the "pro se crisis,"[190] Russell Engler argues that the traditional role of the judge is based on the assumption that in an adversarial system, both parties are represented by counsel.[191] Since this idealized version of the system does not describe the reality of most housing courts, Engler argues that it is appropriate for judges, mediators, and clerks in these courts to reexamine their traditional roles.[192] Though the traditional role of the judiciary is one of impartiality,[193] Engler proposes that the housing court itself should provide help to the unrepresented party and should explain to all parties why it is giving more aid to one party than the other.[194] This help can consist of giving legal advice, calling witnesses, and conducting direct or cross-examinations for the pro se litigant.[195] As Engler states, a judge "must be as active as necessary to ensure that the legal system's promise of fairness and substantial justice is not frustrated by the litigant's appearance without a lawyer."[196] A judge who is willing to seek justice actively for the tenant in housing court can fill some of the void left by the absence of counsel, thus maintaining the overall impartiality of the system.[197]

CONCLUSION

Overall, advocates make very strong legal, practical, and moral arguments for a recognition of a right to counsel in eviction cases. In order for the poor to have any sort of meaningful access to justice in complicated and high stakes eviction proceedings, it seems crucial and just for the courts to recognize this right. As critics point out, however, when we look towards expansion as a way to solve social and political problems, we must be critical of the system we are expanding. Advocates for expanding the right to counsel must take precautions not to replicate the weaknesses of the adversarial system, thus amplifying the system's negative effects and its contribution to inequality. With a combined effort, however, the courts, law schools, and practicing professionals may actually create lasting change in a system which now produces so much inequality.

190. Engler, *supra* note 6, at 1987.
191. *See id.* at 1988.
192. *See id.* at 1990.
193. *See id.* at 2023.
194. *See id.* at 2023-24, 2028.
195. *See id.*
196. *Id.* at 2028
197. *See id.* at 2028-31.